80-409

Supreme Court, U. S.
FILED
JUL 7 1980
MICHAEL RODAK, JR., CLERK

SUPREME COURT OF THE UNITED STATES
1979-1980 Term

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Norman C. Thomas — **Petitioner**

vs.

United States of America — **Respondent**

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On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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PETITION FOR WRIT OF CERTIORARI

••

Norman C. Thomas, pro se

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QUESTIONS PRESENTED

COMES NOW, Norman C. Thomas, petitioner herein, appearing pro se, beseeching this Court's judgement to elucidate the following issues, presents unto the Court the questions which remain unsettled:

1. Whether the tax solicited by the Internal Revenue Service in the case at hand is a direct tax or an indirect tax.

2. Whether the tax solicited by the Internal Revenue Service has been solicited in a manner harmonious with the Constitution of the United States.

3. Whether the Federal Court has jurisdiction to entertain the action to enforce a civil summons extending to the private banking records of the petitioner while acting in the capacity of a sovereign citizen.

STATEMENT OF THE CASE

On June 15, 1979, the Internal Revenue Service (IRS) issued to the First National Bank of the Black Hills, and to the National Bank of South Dakota, an IRS Form 2039, Civil Summons, for the purpose of examination of the private banking and/or financial statements of Norman Thomas. Being certain that the banking records sought would contain only the private transactions of a citizen acting in a sovereign capacity, Norman Thomas directed officers of these institutions not to honor the civil summons.

On September 28, 1979, a petition was filed in District Court [1] to enforce the Internal Revenue Summons.

On October 22, 1979, Norman C. Thomas filed in District Court, a motion to dismiss the action for lack of jurisdiction. The argument in support of this motion centered largely on the contention that as a private citizen in the exercise of a Constitutionally guarded right, [2] the civil summons did not gain the jurisdiction of the citizen and likewise the Court did not have jurisdiction to entertain the action.

Also, it was contended to the District Court that the tax being solicited by the IRS is an indirect tax, which Norman C. Thomas denied being subject to while in the exercise of a Constitutionally guarded right.

While not addressing the issue of the origin or jurisdiction of the tax, the District Court ordered the summons enforced. [3]

The opinion of the District Court was affirmed by the United States Court of Appeals for the Eighth Circuit, [4] stating that the tax on income is

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(1) United States District Court for the District of South Dakota, Western Division. Docket nos. MISC 79-14W and MISC. 79-15W; Honorable Judge Andrew Bogue, presiding.

(2) The right to work; due process clause, Amendment V, U.S. Constitution.

(3) Decided on November 07, 1979
USCA 79-1978 and USCA 79-1979

(4) Before: Circuit Judges Bright, Henley, and McMillian, filed April 07, 1980.

direct tax, [5] citing Brushaber v. Union Pacific R.R. 240 U.S. 1, 18-19 (1916), and Eisner v. Macomber, 252 U.S. 189, 198 (1920).

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[5] This decision was petitioned for clarification on April 15, 1980, with attached pages 10,11, 17, 18, 19 of the Opinion of the Court of Brushaber v. Union Pacific R.R., 240 U.S. 1. Petition was denied on April 24, 1980.

JURISDICTION OF THE COURT

This petition for review on writ of certiorari has gained the jurisdiction of the Court in a two-fold manner. In the first instance, the opinion of the lower court must be construed to conflict with the opinion of this court as adjudged in Brushaber v. Union Pacific Railroad Co., 240 U.S. 1; and Pollock v. Farmers Loan and Trust, 158 U.S. 601. Secondly, the issue has gained public concern, whereas the controversy has been narrowed to a dispute of the Constitutionality of an act of Congress.

ARGUMENT

The lower court has rendered the opinion that the tax on income is Constitutional and a direct tax. While a tax on income administered under the rules of indirect is admittedly Constitutional, and the tax solicited in the case at hand is admittedly a direct tax, these conclusions are not synonomous nor interchangeable in that a tax on income which finds its origin in Article 1, Section 8, of the Constitution or from the Sixteenth Amendment to the Constitution, (indirect taxes) bears no weight in the taxation power subject to Article 1, Section 9, of the U.S. Constitution. (direct taxes) See Brushaber v. Union Pacific R.R. Co., supra; also Pollock v. Farmers Loan and Trust, supra.

The lower court has recognized the tax solicited in the instant case to be a direct tax, with consideration that the source from which the tax is solicited is a citizen while in the exercise of a God given, Constitutionally guarded right.

The lower court has not given recognition to the fact that a direct tax needs apportionment to be in harmony with Article 1, Section 9, of the U.S. Constitution.

The lower court cited Eisner v. Macomber, 252 U.S. 189, 198, as authority for taxation of compensation for labor or services performed. So that the opinion of Eisner v. Macomber, supra, does not conflict with the opinion of Brushaber v. Union Pacific R.R., supra, the wording, "the gain (derived)...from capital, from labor, or from both combined", must be interpreted to mean a profit which is subject to an indirect tax, such as gain derived from contracting labor rather than the act of labor in itself.

The Brushaber Court, while affirming the Constitutionality of the Sixteenth Amendment to the Constitution of the United States, held that the Amendment did not authorize an income tax in a generic sense, but restricted the taxation power under its authority to indirect taxes or Article 1, Section 8, of our Constitution. See Brushaber v. Union Pacific R.R., p 17, 18, 19, supra.

The solicitation of a direct tax without apportionment is violate of Article 1, Section 9, of U.S. Constitution.

Therefore, petitioner concludes that there is no power granted in the U.S. Constitution which allows the collection of a direct tax without apportionment; that the tax solicited in the case at hand is a direct tax; and that a misinterpretation of previous Supreme Court decisions has caused the lower court to entertain an action of which they have no jurisdiction.

Petitioner prays this esteemed court find its duty to protect the right of the citizen to enjoy Constitutional obedience, and affirm that the direct tax is not being solicited in a manner which carries the strength of the Constitution; therefore, the Federal Court does not have jurisdiction to enforce the civil summons in the case at hand.

Respectfully submitted,

_____

Norman C. Thomas, pro se

Dated this _____ day of September, 1980.

United States Court of Appeals
For the Eighth Circuit

No. 79-1978
United States of America and Kevin R. Whalen, Special Agent of the Internal Revenue Service,

Appellees,

v.

First National Bank of the Black Hills, by and through Roger Hodson, Operations Officer,

Norman C. Thomas,
Appellant.

No. 79-1979
United States of America and Kevin R. Whalen, Special Agent of the Internal Revenue Service,

Appellees,

v.

National Bank of South Dakota, by and through Lucille Crow, Vice President,
Norman C. Thomas,
Appellant.

Appeals from the United States District Court for the District of South Dakota.

Submitted: March 28, 1980
Filed: April 7, 1980

Before Bright, Henley and McMillian, Circuit Judges.

PER CURIAM.

Taxpayer intervenor appeals from the two orders of the district court[1] enforcing Internal Revenue summonses pursuant to 26 U.S.C. §§ 7402(b) and 7604(a).[2] The only issues raised by taxpayer in his fifteen page pro se brief on appeal are: (1) whether the income tax is constitutional, a direct or indirect tax, and applicable to compen-

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1 The Honorable Andrew W. Bogue, United States District Judge for the District of South Dakota.

2 In a similar case, handed down today, involving the same Internal Revenue Agent and district court, we found the appeal had established a prima facie case for enforcement and that the taxpayer had made no effort to carry his burden under **United States v. LaSalle National Bank,** 437 U.S. 298 (1978), or of disproving the existence of a valid civil tax determination purpose. **See United States v. Hoffman,** No. 79-2019 (8th Cir. April ____, 1980). A search of the original files in the instant appeal shows the summonses, affidavits, and petitions in the instant case were virtually identical to those in **Hoffman** (in the instant case the summons to the first National Bank of the Black Hills sought only commercial loan liability ledgers, installment loan ledgers, loan applications, financial statements, and related loan liability documents, while the summons to the National Bank of South (cont.)

sation for labor, (2)whether the summonses are criminal in nature because they are sought under Title 26 of the U.S. Code, (3) whether the district court has jurisdiction over taxpayer to order the summons enforced, and (4) whether the purpose of the government in a subpoena directed to his employer was to harass taxpayer and tarnish his reputation with his employer.

It is clear that tax on income is constitutional and a direct tax, and that Congress has intended to tax income from a number of sources, including compensation for labor or services performed. **United States v. Francisco,** No. 79-1795 (8th Cir. Feb. 6, 1980) (slip op. at 4); **see generally, Eisner v. Macomber,** 252 U.S. 189, 198 (1920); **Brushaber v. Union Pacific R.R.,** 240 U.S. 1, 18-19 (1916). The Internal Revenue Service may summon documents and take testimony to determine liability for income taxes under 26 U.S.C. § 7602,

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(cont.)
Dakota sought the same documents requested from the First National Bank of the Black Hills in **Hoffman**). In **Hoffman** and the instant case the government established a case for enforcement, the taxpayer failed to show the summons was issued for an improper purpose and the district court correctly ordered the summonses enforced.

In the instant case, as in **Hoffman,** Judge Bogue granted a stay pending appeal, **citing United States v. Olson,** 604 F. 2d 29 (8th Cir. 1979).

the federal district courts have authority to order the summonses enforced by 26 U.S.C. §§ 7402(b) and 7604(a). **See Couch v. United States,** 409 U.S. 322 (1973); **Donaldson v. United States,** 400 U.S. 517 (1971).

Taxpayer's final claim of harassment and damage to his reputation with his employer relates to a summons to his employer issued June 11, 1979.[3] Since that summons was not the subject of enforcement proceedings below, a petition for enforcement and attack on that summons should first be addressed to and considered by the district court.

For the foregoing reasons we affirm the orders of the district court enforcing the summonses issued to the First National Bank of the Black Hills and the National Bank of South Dakota.

A true copy.
Attest:
Clerk, U.S. Court of Appeals, Eighth Circuit.

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3 The two summonses that are the subject of the instant appeal were both issued July 2, 1979, and the two petitions for enforcement were both filed September 28, 1979.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

UNITED STATES OF AMERICA and Kevin R. Whalen Special Agent of the Internal Revenue Service, Petitioners-Appellees	)	
v.	)	79-1978
FIRST NATIONAL BANK OF THE BLACK HILLS, by and through Roger Hodson, Operations officer, Respondent, NORMAN C. THOMAS, Intervenor-Appellant.	)	
. . . . .		
UNITED STATES OF AMERICA and Kevin R. Whalen, Special Agent of the Internal Revenue Service, Petitioners-Appellees,	)	
v.	)	79-1979
NATIONAL BANK OF S.D., by and through Lucille Crow, Vice-President, Respondent, NORMAN C. THOMAS, Intervenor-Appellant.	)	

NOTICE OF APPEAL

NORMAN C. THOMAS, pro se
613 Dakota Drive
Rapid City, South Dakota 57701

NOTICE OF PETITION TO THE SUPREME COURT OF THE UNITED STATES FOR WRIT OF CERTIORARI

I. Notice is hereby given that Norman C. Thomas, appellant fore named, hereby appeals to the Supreme Court of the United States from the decree affirming the orders of the district court, entered in this action on April 7, 1980; petitioned for clarification on April 15, 1980, and denial of petition entered on April 24, 1980.

II. The clerk will please prepare a transcript of the record in this case for transmission to the clerk of the Supreme Court of the United States.

III. The issue to be presented on petition for writ of certiorari, is the showing that there is a conflict with the opinion of the court with previous supreme court decisions. This misinterpretation of said supreme court decisions which outline the Constitutional limitations of the taxation power granted to Congress, has inadvertently caused this court to embrace an activity destructive to Constitutional principle.

IV. Since this issue has been narrowed to a controversy involving the constitutionality of an act of Congress, the Solicitor General is also to receive notification of this issue and likewise be served all pertinent records.

(sig.)_____
Norman C. Thomas, pro se.

PROOF OF SERVICE

I, Norman C. Thomas, petitioner herein, by support of affidavit, hereby certify that on the _____ day of September, 1980, I served copies of the foregoing Petition for Review on Writ of Certiorari to the Supreme Court of the United States on the parties thereto as follows:

1. On the United States, by mailing a copy by certified mail to Terry Pechota, U.S. Attorney, 515 Ninth Street, Rapid City, South Dakota 57701, and by mailing a copy certified mail to the Solicitor General, Department of Justice, Washington, D.C. 20530.
2. On the Internal Revenue Service, by mailing 3 copies by certified mail to M. Carr Ferguson, Assistant Attorney General, Tax Division, Department of Justice, Washington, D.C. 20530.

_____

Norman C. Thomas

AFFIDAVIT

I, Norman C. Thomas, being duly sworn upon my oath, depose and swear that on this _____ day of September, 1980, I did accomplish the action described in the foregoing statement.

_____

Norman C. Thomas, Affiant

State of South Dakota)
) ss
County of Pennington)

Subscribed and sworn to before me this _____ day of September, 1980.

(SEAL) _____
Notary Public
My Commission expires: _____

Supreme Court, U.S.
FILED
OCT 16 1980
MICHAEL RODAK, JR., CLERK

No. 80-409

In the Supreme Court of the United States

OCTOBER TERM, 1980

NORMAN C. THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

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Section 7604(a) 3

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-409

NORMAN C. THOMAS, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks review of the decision below enforcing internal revenue summonses directing two financial institutions to produce records of petitioner's accounts with those institutions.

The pertinent facts are undisputed and may be summarized as follows: As part of his investigation into petitioner's tax liabilities for the years 1977 and 1978, Special Agent Kevin R. Whalen of the Criminal Investigation Division, Internal Revenue Service, issued the summonses here in question to two banks. In accordance with Section 7609 of the Internal Revenue Code of 1954 (26 U.S.C.), petitioner and his wife gave notice to both banks not to comply with the summonses. When the banks refused to comply pursuant to these

notices, the government petitioned the United States District Court for the District of South Dakota for enforcement of the summonses. In his affidavits filed with the petitions, Agent Whalen stated that he was conducting an investigation for the purpose of determining the correct federal income tax liabilities of Norman C. Thomas for the taxable years 1977 and 1978; that the summoned testimony and documents were not in the government's possession; and that all administrative steps required by the Internal Revenue Code had been followed.

Petitioner intervened in the enforcement proceeding and filed motions to dismiss for lack of jurisdiction and motions for an "Order of Restraint" seeking to restrain the government from proceeding with the enforcement actions. He alleged no facts challenging the government's satisfaction of the prerequisites to enforcement of the summonses. Rather, he challenged the jurisdiction of the district court to order enforcement of the summonses, argued that the summonses were criminal in nature because they were issued under Title 26 of the United States Code, and asserted that the income tax is unconstitutional. The district court ordered the summonses enforced. The court of appeals affirmed (Pet. App. 1-4).

1. Petitioner contends (Pet. 1, 5-6) that the federal courts are without jurisdiction to enforce internal revenue summonses. But the power of the Congress to authorize the Commissioner of Internal Revenue to obtain information by way of administrative process and to confer jurisdiction on the courts to compel compliance with that process is beyond serious question. Article I, Section 8, of the Constitution gives Congress the specific power to lay and collect taxes, and the power to enact

laws necessary to give effect to the taxing power. Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.), which gives the Commissioner power to summon and examine data for the purpose of ascertaining the correctness of any tax return, making a return where none has been filed, or determining correct tax liabilities, is clearly an investigative tool provided by Congress to aid the Commissioner in the discharge of his duty to collect taxes. See *United States* v. *Euge,* 444 U.S. 707 (1980).

Similarly, the power of the district courts to adjudicate summons enforcement actions is well settled. The broad judicial power defined in Article III, Section 2, of the Constitution extends to all cases, in law and equity, arising under the Constitution or the laws of the United States, and to controversies to which the United States is a party. Congress has specifically conferred jurisdiction on the district court, under Sections 7402(b) and 7604(a) of the Internal Revenue Code of 1954 (26 U.S.C.), to compel the production of the very type of documents involved in this case. See *Couch* v. *United States,* 409 U.S. 322, 326 (1973); *United States* v. *Gajewski,* 419 F. 2d 1088, 1091 (8th Cir. 1969), cert. denied, 397 U.S. 1040 (1970); *United States* v. *First National Bank of Pikeville,* 274 F. Supp. 283 (E.D. Ky. 1967), aff'd *sub nom., Justice* v. *United States*, 390 U.S. 199 (1968).

Furthermore, the constitutionality of the summons enforcement statutes, as well as the judicial power to enforce summonses, has repeatedly been upheld by this Court. See *Couch* v. *United States, supra; Donaldson* v. *United States,* 400 U.S. 517 (1971); *United States* v. *Powell,* 379 U.S. 48 (1964); *Reisman* v. *Caplin*, 375 U.S. 440 (1964).

2. Petitioner also argues (Pet. 4-6) that an income tax on compensation earned from personal services is a direct tax subject to the apportionment requirements of Article I, Section 9, of the United States Constitution, and that because the apportionment requirements of that Article have not been met, the income tax is unconstitutional. There is no basis for his contention. The Sixteenth Amendment specifically eliminated the requirement of apportionment of direct taxes on income. It is therefore clear that Congress has the power to tax income from compensation for labor. *Brushaber* v. *Union Pacific R.R.*, 240 U.S. 1, 17-19 (1916).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

OCTOBER 1980

DOJ-1980-10

Supreme Court, U. S.
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No. 80-409

SUPREME COURT OF THE UNITED STATES
October Term, 1980

Norman C. Thomas, Petitioner

vs.

United States of America, et al Respondent

On Petition for a Writ of Certiorari
to the United States Court of Appeals
to the Eighth Circuit

Petitioner's Reply to Respondent's Memorandum

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TABLE OF AUTHORITIES

CONSTITUTION:

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157 U.S. 429 ..... page 1
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240 U.S. 1 ..... page 1, 2, 3

REPLY TO RESPONDENTS MEMORANDUM

Petitioner seeks this Court's review of the lower court's decision, in which while enforcing an Internal Revenue Service's civil summons, has left unsettled a dispute of the constitutionality of an act of Congress.

Petitioner has brought forth the showing that a tax on compensation for labor is a direct tax, subject to the apportionment requirement of Article 1, Section 9, of the United States Constitution. In support of this argument, Petitioner has relied on the decisions of this court in the cases of *Pollock v. Farmers Loan and Trust Co.*, 157 U.S. 429; and also *Brushaber v. Union Pacific R.R. Co.*, 240 U.S. 1.

Respondent has offered no challenge to the fact that the tax on compensation for labor is a direct tax. Rather, the respondent alleges that the apportionment requirement of Article 1, Section 9, of the U.S. Constitution was eliminated with the Sixteenth Amendment of the Constitution. This allegation is totally without foundation, as this argument has already been dismissed by this court in the case of *Brushaber v. Union Pacific R.R.*, supra.

The text of the "Opinion of the Court" in the *Brushaber Case* makes it clear beyond debate that the Sixteenth Amendment does not purport to authorize a direct tax without apportionment. In the words of this court, this argument was viewed as an "erroneous assumption":

> "...The various propositions are so intermingled as to cause it to be difficult to classify

them. We are of the opinion, however, that the confusion is not inherent, but rather arises from the conclusion that the Sixteenth Amendment provides for a hitherto unknown power of taxation, that is a power to levy an income tax which although direct should not be subject to the regulation of apportionment to all other direct taxes. And the far-reaching effect of this *erroneous assumption* will be made clear by generalizing the many contentions..." (Emphasis added).
Brushshaber v. Union Pacific R.R., p. 10, 11

Also, at pages 18 and 19 in the *Brushaber Case*, this Court reiterates the opinion that the Sixteenth Amendment does not create a taxation power which authorizes a direct tax without apportionment:

"...Second, that the contention that the Amendment treats a tax on income as a direct tax although it is relieved of apportionment and is necessarily therefore not subject to the rule of uniformity as such rule only applies to taxes which are not direct thus destroying the two great classifications which have been recognized and enforced from the beginning, is also *wholly without foundation* since the command of the Amendment that all income taxes shall not be subject to apportionment by a consideration of the sources from which the taxed income be derived, *forbids* the application to such taxes of the rule applied in the *Pollock Case* by which alone such taxes were removed from the great class of excise, duties and imposts subject to the rule of uniformity and

were placed under the other or direct class..." (Emphasis added) *Brushaber v. Union Pacific R.R.* p.18, 19.

With consideration of the facts petitioned to the Court, there would be no enlightenment to Petitioner or Respondent, nor would the Constitution be served or strengthened by the denial of the petition for writ of certiorari.

Respectfully submitted,

_____

Norman C. Thomas, pro se

PROOF OF SERVICE

I, Norman C. Thomas, petitioner herein, by support of affidavit, hereby certify that on the _____ day of November, 1980, I served copies of the foregoing Reply to Respondents Memorandum on the parties thereto as follows:

1. On the United States, by mailing a copy by certified mail to Terry Pechota, U.S. Attorney, 515 Ninth Street, Rapid City, South Dakota 57701, and by mailing a copy certified mail to the Solicitor General, Department of Justice, Washington, D.C. 20530.
2. On the Internal Revenue Service, by mailing 3 copies by certified mail to M. Carr Ferguson, Assistant Attorney General, Tax Division, Department of Justice, Washington, D.C. 20530.

AFFIDAVIT

I, Norman C. Thomas, being duly sworn upon my oath, depose and swear that on this _____ day of November, 1980, I did accomplish the action described in the foregoing statement.

_____
Norman C. Thomas, Affiant

State of South Dakota)
) ss
County of Pennington)

Subscribed and sworn to before me this _____ day of November, 1980.

(SEAL) _____
Notary Public
My Commission expires: _____